86-1110

NO.___ _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ENTERPRISE TOOLS, INC.
AND E.B. BENNETT, PETITIONERS,

v.

EXPORT-IMPORT BANK OF
THE UNITED STATES,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals violated provisions of Federal Rules of Civil Procedure 52(a) in failing to apply the clearly erroneous standard of review.

2. Whether the Court of Appeals has established a heretofore unheard of category of contract, i.e. "slightly ambiguous", to which is applied a different standard of factual review than the one applicable to either unambigous contracts or ambiguous contracts.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were petitioners Enterprise Tools, Inc. and E.B. Bennett and the respondent The Export-Import Bank of the United States.

Corporate petitioner has no parent corporation, no affiliates or subsidiaries.

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IN THE SUPREME COURT

OF

THE UNITED STATES

ENTERPRISE TOOLS, INC.
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

Petitioners Enterprise Tools, Inc. and E.B. Bennett respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on September 2, 1986 with a Petition for Rehearing denied on October 2, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 799 F.2d 437 and is reprinted, in Appendix A, p. 1a, infra. The Eighth Circuit's Order dated October 2, 1986, denying the Petition for Rehearing or for Rehearing En Banc is reproduced in Appendix B, p. 1b, infra.

The formal findings of fact of the United States District Court for the Eastern District of Arkansas, Western Division (Eisele, D.J.) has not been reported. They are reproduced in Appendix C, p. 1c, infra. The judgment of the Trial Court is reprinted in Appendix G, p. 1g infra. The District Court's Order and Opinion granting attorney's fees pursuant to the Equal Access to Justice Act (28 U.S.C. §2411(d) was not reported but is reprinted in Appendix D, p. 1d, infra. The Eastern District's Order denying the Export-Import Bank's Motion to Dismiss is reported at 564 F. Supp. 761,

(E.D. Ark., 1983) and is reprinted in Appendix E, p. 1e, infra. The District Court's Order denying a Motion for Summary Judgment is not reported but is reproduced in Appendix F, p. 1f, infra.

JURISDICTION

Federal jurisdiction is under 28 U.S.C. Section 1331 in the U.S. District Court for the Eastern District of Arkansas. On February 21, 1984, the Eastern District Court denied respondent's Motion for Summary Judgment and the case was tried to the Court, in a bifurcated fashion. The liability phase was tried between January 28 - February 1, 1985, and the damage phase was tried on May 5, 1985, wherein judgment was granted petitioner along with a later award of attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. §2411(d), said Order entered August 26, 1985.

On respondent's appeal pursuant to 28 U.S.C. 1291, the Eighth Circuit on

September 2, 1986, entered a judgment and opinion reversing the District Court. The Eighth Circuit denied petitioners' Request for Rehearing and for Rehearing En Banc on October 12, 1986.

The jurisdiction of this court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254, (1).

STATEMENT OF THE CASE

This lawsuit involves the interpretation of a Comprehensive Services Export Credit Insurance policy No. CV-0085 issued by the Foreign Credit Insurance Association and the Export-Import Bank of The United States. Congress recognized a serious national problem relating to our huge trade deficit and responded to the needs it perceived by setting up the Export-Import Bank of the United States (Eximbank). (TR. 940, L.5-12). As part of a program to encourage American business to engage in more international trade, and as part of the inducement package, Eximbank offered insurance protection against perils - "political risks" - not common to the average American business man. Large American insurance companies came together (FCIA) to offer coverage for the "commercial risks" in doing business overseas and the Eximbank undertook

to underwrite the "Political Risks". With respect to this particular policy, Eximbank has underwritten 100% of the commercial risks and 100% of the political risks involved. The questions before the Court below were: the nature and extent of the coverage provided by the policy; whether the events which were insured against had, in fact, occurred; and, the extent of the damages suffered.

The trial Court in denying a Motion for Summary Judgment filed by the Export-Import Bank of The United States found, months before trial, that the policy contained ambiguities and was susceptible to various interpretations. (Court Order of 2/21/84, App. F, p. 1f) In keeping with this Order, the Court at trial allowed parol evidence with regard to the negotiations between the parties for the issuance of the policy as well as testimony from both sides as to the coverages provided. In addition, Robert L.

Charamella, Deputy Vice President, Export Insurance Division of the Export-Import Bank of The United States admitted liability, without objection, by testifying that the policy in question provided coverage for plaintiffs for confiscation of their equipment. (TR. 661, L.7-9; TR. 664, L.14-18; TR.665, L.2-16)

The case was bifurcated for trial and after a five (5) day hearing on the liability issues, the Court found in favor of plaintiffs and against the defendant, Export-Import Bank. The hearing then proceeded to the damage phase and was heard in a one (1) day trial on May 16, 1985. Judgment was entered in favor of plaintiffs on May 17, 1985 totalling $585,490.00 which included pre-judgment interest. Subsequent to that, the plaintiffs applied for and received an award of attorney's fees and expenses pursuant to the Equal Access to Justice Act in the sum of $171,193.76.

The $756,683.76 judgment rendered by the District Court in petitioners' favor was reversed at the Court of Appeals after a characterization that the policy was slightly ambiguous. The Court of Appeals quoted approvingly the Export-Import Bank's witnesses' testimony at trial that coverage provisions of the policy did not apply to the expropriation of petitioners' equipment. The Court of Appeals gave credibility to the testimony of two witnesses which the Court below saw and heard over five days of testimony and found to be incredible. No analysis of the District Court's fact findings was made, and nothing in the opinion indicated that the Court of Appeals found the fact findings below to have been clearly erroneous. Further, another reading of the Opinion would indicate that the Court in finding the policy to be "slightly ambiguous" established a new standard of

factual review and a new category of ambiguous contract lying somewhere between the clear contract and the ambiguous one.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE COURT'S OPINION IN ICICLE SEAFOODS, INC. v. WORTHINGTON, 475 U.S. ___, 89 L.Ed 2d 739, 106 S Ct 1527 (1986).

The Advisory Committee notes to the recent revisions of Federal Rules of Civil Procedure 52(a) state that:

> "to permit courts of appeals to share more actively in the fact finding function would tend to undermine the legitimacy of the district courts in the eyes of the litigants, multiply appeals by encouraging appellate re-trial of some factual issues, and needlessly reallocate judicial authority."1

The Court of Appeals decision is in direct conflict with this Court's opinion in

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1. Litigation The Journal of the Section of Litigation, ABA, Vol. 13, No. 1, P.7, (Fall 1986)

Icicle Seafoods v. Worthington, 475 U.S. ___, (1986). As a basis for its reversal the Court of Appeals quotes from the testimony of Export-Import Bank witnesses Charamella and Willyard.

The Court of Appeals failed to follow the requirements of F.R. Civ.P 52(a) and the opinion of the U.S. Supreme Court in Icicle Seafoods, Inc. v. Worthington, 475 US ____, 89 L.Ed 2d 739, 106 S Ct 1527.

This Court's language in Icicle Seafoods, Inc. v. Worthington, in reaffirming the efficacy of F.R. Civ.P. 52(a), is uniquely appropriate to the case at bar:

> "If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings it could have reversed the District

> Court's judgment. But it should not simply have made factual findings on its own. As we stated in Anderson v. Bessemer City, 470 U.S. ____, 84 L.Ed2d 518, 105 S Ct 1540 (1985):
>
> 'The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.'"

It appears from its decision that the Court of Appeals for the Eighth Circuit has not followed the mandate of this Court as reiterated expressly in Icicle, supra. Certiorari should be granted to give this Court an opportunity to correct this apparent error.

The Court of Appeals chose to believe a part of witness Charamella's testiomny that the trier of Fact, Judge Eisele, found unbelievable, that is, that the Exim Bank has no policies that cover equipment loss. In fact, Charamella admitted to Judge Eisele

that he gave a contrary opinion in his deposition then later under cross-examination revealed he didn't realize the mistake until his third reading of the deposition on the night before he was to testify. Judge Eisele saw the witness, heard his testimony and found it incredible.

The Panel also decided to believe the Exim's witness Willyard to the effect that he told Bennett to go elsewhere for coverage for his equipment. Judge Eisele, who heard five days of testimony during the liability phase said as to Willyard:

> "I know that's his explanation. I'm just simply telling you I have listened to the evidence and you [Eximbank] have lost that one in terms of what I view the facts to be. I do not look upon that [no insurance for equipment loss] as having been explained to Mr. Fulmer [Bennetts Insurance Broker] that he could not get the insurance. On the contrary, I look upon it as being explained there are other sources he can check out, which he did. He preferred the X-M Bank. I may be wrong, but that's my view of the evidence, having heard both witnesses." (TR.941, L.10-18)

The Court of Appeals panel majority stated that "concededly" Bennett never read the policy. There was no such concession. Bennett testified:

> " ... when it came to me I looked at it, I looked for what I was looking for ... the limits and what it done and how it done it." (TR. 275, L.9-13)
>
> "I looked at the front page of it and it said -- what I needed is what it said, and I assumed that thats the way it was (TR. 275, L.18-19)

The fact is that it was never read in detail but it was reviewed generally as to the limits and types of coverage - Commercial Credit Risks and Political Risks - but the panel disregards the Trial Court's finding that:

> THE COURT: Well, of course, he accepted the coverage on the basis of the information that he received. You know, it's the dealings between the parties and the resulting document that the Court has to deal with. I'm not so sure. The assumption is had they sat down and read it carefully, they would realize that they are not covered. I think we are getting close to coming to the opposite conclusion: that had he

done so, they would have been reassured generally in terms of what they thought they were getting, at least in terms of their prior conversations and looking at the documents in light of those prior conversations. (TR. p.943, L.17-25, TR. 944, L.1-2)

Judge Eisele's fact findings were even more credible given the testimony from both sides (Fulmer for Bennett, Willyard for Exim) that Bennett was seeking coverage for his equipment if confiscated:

THE COURT: Can you tell me what you told him or approximately?

THE WITNESS: [Fulmer] Well, you mean like --

THE COURT: What coverage you were requiring?

THE WITNESS: Well, the coverage that we were primarily interested in would be the accounts receivable in Mexico and also the equipment, the confiscation or nationalization of the equipment inside of the country. That's really the only two things that I feel like at the time that we were concerned about or interested in. (TR.568, L.23 - TR.569, L.7)

THE COURT: So am I to understand that he asked you for coverage against confiscation?

THE WITNESS:[Willyard] In the course of our conversations he asked me whether we would be able to cover confiscation of the mobile assets in Mexico and I said, "No, the only -- we are a credit insurer. Credit insurers deal only with receivables." (TR.718, L.23 - TR.719, L.3)

(In response to the latter part Willyard's answer this Trial Court said:

> "Anyway, I accept his [agent Fulmer's] testimony that he did seek the coverage and that Mr. Willyard knew it, and he thought when he applied for it he was going to get it." (TR. 936 L.23-25.)

The Appeals Court never mentioned any of the factual findings of Judge Eisele, and did not discuss or analyze them. The Appeals Court did not apply the standard mandated by F.R. Civ. P. 52(a) and the principles of such review as required in Icicle Seafoods, Inc. v. Worthington, supra.

The Court of Appeals panel did not point out any of the Trial Court's findings which it found to be clearly erroneous and not supportive of the Trial Court's

interpretation of the ambiguous policy, a policy which the Trial Court characterized as:

> "the worst insurance contract I have ever seen. It's one of the poorest contracts I have ever seen." (TR. 1013, L.14)

The opinion of the Trial Court relating to the award of attorney's fees (App. D p.1d) demonstrates the depth of the Trial Court's conviction as to the factual determinations in this case and demonstrates anew the superior position and expertice of the Trial Judge in making fact findings. It also demonstrates the necessity for the trier of facts to weigh, evaluate and resolve conflicts between contradictory testimony and to determine the credibility of witnesses.

2. THE COURT'S OPINION BELOW CAN BE READ TO ESTABLISH A HERETOFORE UNKNOWN CATEGORY OF "SLIGHTLY AMBIGUOUS" CONTRACT WITH A STANDARD OF FACTUAL REVIEW DIFFERENT FROM THAT REQUIRED WHEN A CONTRACT IS AMBIGUOUS.

The Eight Circuit Opinion seems to establish a heretofore unheard of category of Contract. Courts have in the past dealt with the interpretation of two categories of Contracts - ambiguous and unambiguous. The Court's opinion in this case seems to establish a third category of contract charaterized as the "slightly ambiguous contract". (App. A, p.12A). The Court of Appeals Panel majority found the insurance contract at issue to be "slightly ambiguous". The Court of Appeals panel majority obviously determined that this allowed them to examine, de novo, all the extrinsic evidence relating to the intent of the parties as well as any other factual matters they deemed pertinent, rather than adhering to the "clearly erroneous" standard of factual review mandated by F.R. Civ. P. 52(a) and the decisions of this Court.

Heretofore, unambiguous contracts and the interpretation thereof was a matter of

law. Ambiguous contracts, on the other hand, where extrinsic factual evidence is required for determination of the intent of the parties, must be factually reviewed on appeal as governed by the "clearly erroneous" standard of the Federal Rules and this Court's decisions. The review of the trial court's determination of factual matters essential to the determination of questions of law are governed by the "clearly erroneous" standard, discussed in detail by this Court in Icicle Seafoods, Inc. v. Worthington, supra. In order to maintain uniformity of decisions this heretofore unheard of category of slightly ambiguous contract, which apparently allows de novo interpretations, consideration and findings of the factual matters necessary to an interpretation of contracts at the appellate level, should be reviewed by the Supreme Court.

3. THIS COURT SHOULD BE THE FINAL ARBITOR OF THE PROVISIONS FOUND IN AN INSURANCE POLICY ESTABLISHED UNDER AUTHORITY OF THE UNITED STATES CONGRESS TO PROMOTE FOREIGN TRADE BY U.S. CITIZENS.

The Export-Import Bank of the United States is an independent government agency whose existence and purpose as mandated by the Congress of the United States is to assist generally U.S. business in the area of foreign trade, and, specifically with regard to this case, provide insurance coverage designed to induce American businessmen to engage in the exportation of goods and services into foreign countries. Who better to turn to than our own government to assay the political risk involved in doing business in foreign countries. The uncontradicted testimony below was that plaintiffs requested coverage for the expropriation of their equipment from the Export-Import Bank's agent. The Court below found as a matter of fact that this agent represented to plaintiff's broker that such

coverage was available and issued a policy in response to the broker's request.

The two Courts which considered the issues raised in this case have come

to extremely divergent conclusions. At the trial court level the Court clearly said on a number of occasions that this was not a close case as to the interpretation of the policy, the credibility of the witnesses or the quality of the contract. The District Court labeled this insurance contract the worst it had ever seen, (TR. 1013, L.14). The Court found as a factual matter that the Export-Import Bank represented that it could "tailor" a policy to the plaintiffs' needs; but when a claim was filed, the Export-Import Bank denied the exact coverage plaintiffs requested when the policy was purchased.

The Court of Appeals found the contract to be slightly ambiguous, apparently agreed that the Court below was correct in examining all the extrinsic and parole evidence related to the transaction, but without explanation or analysis substituted it's own fact findings for those of the District

The Supreme Court should finally decide the issue of coverage raised in this suit based upon the need to have finality as to whether the policy in question is meeting the mandates of the Congress which empowered it to engage in political risk insurance.

CONCLUSION

For these reasons, Petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

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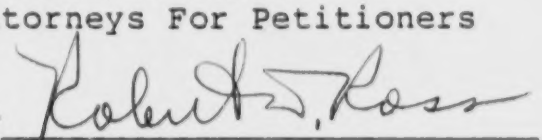
By 
Robert D. Ross
Counsel of Record

Date:
December 30, 1986

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

85-1866 and 85-2155

Enterprise Tools, Inc. & E.B. Bennett	*	
Appellees, v.	*	Appeals from the United States District Court for the Eastern District of Arkansas.
Export-Import Bank of the United States,	*	
Appellant.	*	

Submitted: January 16, 1986

Filed: September 2, 1986

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and ROSS, Circuit Judge.

ROSS, Circuit Judge.

This action requires us to determine whether a policy of credit insurance issued by appellant, the Export-Import Bank of the

United States (Eximbank), and its agent, the Foreign Credit Insurance Association (FCIA),[1] covered the value of certain assets which were confiscated by a foreign government. Appellees, E.B. Bennett and his wholly owned company, Enterprise Tools, Inc., purchased a "comprehensive services export credit insurance policy" in 1980 in connection with petroleum hauling operations to be conducted in Mexico. In order to conduct the fuel transport services, appellees created a Mexican entity, Sociedad Transportadora de Gas y Diesel de Reynosa, S. A. (Gas Transport), which contracted directly with the Mexican government-owned

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[1] FICA is an unincorporated association of insurance companies which, pursuant to 12 U.S.C. §635(c)(2) (1982), acts as an agent for Eximbank in making available export credit insurance to United States exporters. See Lovell Mfg. v. Export-Import Bank of the United States, 777 F.2d 894, 895-96, 899 (3d Cir. 1985); Gensplit Finance Corp. v. Foreign Credit Ins. Ass'n, 616 F.Supp. 1504, 1505-06 (E.D. Wis. 1985).

oil monopoly, Petroleos Mexicanos (Pemex), which needed the transport services. Appellees provided ten trucks for the purposes of the enterprise and held a financial interest in Gas Transport.

Within less than a year after hauling operations began, most of the trucks were seized by agencies of the Mexican government, and appellees have been unable to recover them. Appellees, as the insured,[2] sought to recover the value of the confiscated trucks from Eximbank under the policy. Eximbank denied coverage on the ground that the insurance policy covered only credit losses caused by any of a comprehensive list of enumerated risks such

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[2] We refer to E.B. Bennett and Enterprise Tools, Inc. collectively as "the insured."

as customer default, currency inconvertibility, war or expropriation, but did not cover the value of the insured's assets (other than accounts receivable) lost through any of the enumerated hazards. The district court found the policy ambiguous and construed it as asset protection as well as credit protection insurance. Because we conclude that the policy did not provide coverage for the value of the insured's confiscated equipment, we reverse.

Normal principles of contract interpretation apply to the construction of insurance policies. 2 COUCH, CYCLOPEDIA OF INSURANCE LAW § 15:1 (2d ed. 1984). Words and clauses are to be given their ordinary meaning and effect, and resort to extrinsic evidence is appropriate only to resolve ambiguities. Id. §15:3. Whether an insurance contract is ambiguous is a question of law. Id. Policy language is

ambiguous if it is "reasonably susceptible of two interpretations." Pearce v. General American Life Insurance Co., 637 F.2d 536, 539 (8th Cir. 1980). On the other hand, where a term is defined in the policy, the court is bound by the policy definition. Id. Accord 2 COUCH, supra, at §15:4. Clauses must be read in context. Verlo v. Equitable Life Assurance Society of the United States, 562 F.2d 1034, 1036 (8th Cir. 1977). Ascertaining the parties' intent as expressed in the policy is the object of construction of the document. 2 COUCH, supra, at §§15:9-15:11. While ambiguities are to be construed in favor of the insured, a court may not rewrite the contract. Id. at §15:10.

The Eximbank policy provided two types of coverage: "Coverage A--Commercial Credit Risks" and "Coverage B--Political Risks." Coverage A indemnified the insured for

"loss"[3] incurred in connection with "covered services" caused by the "customer's" (1) insolvency or (2) substantially overdue payment of amounts owed the insured under the "service contract." A reading of the contract in its entirety, particularly the definitions, establishes that "covered services" referred to the petroleum

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[3] The Policy definition of "loss" was as follows: "loss," except as hereinafter provided, means:

> 1. with regard to covered services performed for the customer, the contract payment value thereof less:
>
> (a) discounts or other similar allowance; (b) any amount which, prior to the time of payment by the Insurers hereunder, the Insured has received from any sources as or towards payment of the contract payment including realization of any security and resale of the services; (c) any amount which the customer would have been entitled to take into account by way of payment, credit,

Footnote 3 continued

set-off or counterclaim and any sums or credits which the Insured is entitled to appropriate as or towards payments of the contract payment; and (d) any expenses saved by the Insured by the non-payment of agent's commission or otherwise;

2. with regard to covered services, commenced but not fully performed (through no fault of the Insured), the contract payment therefore (i) less:

(a) value of covered services not performed;

(b) discounts or other similar allowances:

(c) any expenses saved by non-fulfillment of the service contract; and

(d) any amount which, prior to the time of payment by the Insurers hereunder, the Insured has received from any sources as or towards payment of the contract payment including realization of any security and resale of the services;

(ii) plus such other costs as may be specifically agreed upon and approved by the Insurers in the Declarations;

hauling services undertaken for Pemex; that the "customer" meant Pemex, and that the

Footnote 3 continued

3. with regard to the additional charges specified in subparagraph 2b(2) of Coverage B--Political Risks, the actual amount of such charges, less any allowance, rebate or refund to which the Insured is entitled by reason of the interruption or diversion.

"Loss" thus meant the failure of the insured's overseas customer to make the full contract payment. "Contract payment" was defined as follows:

> "contract payment" means the amount in United States dollars which the service contract requires by its terms to be paid for covered services performed, or which would have been required to be paid if the covered services had been fully performed, during any performance period (plus any insurance freight, transportation, or other charges paid or to be paid in United States dollars by the Insured on the customer's behalf and allocable to the performance period) but shall not include any cash payments received from the customer on or before the date of commencement of services.
>
> (All emphasis in original.)

"service contract" referred to the agreement between the insured (via Gas Transport) and Pemex.

Coverage B included two subsections: "1. Transfer Risk" and "2. Other Political Risks." Transfer risk contemplated the loss of contract payments to the insured caused by the inability of the customer's government to transfer local currency into United States currency. The Coverage A commercial credit risks and Coverage B (1.) currency convertibility risk are not at issue in this case. However, Coverages A and B(1.) unambiguously indemnified the insured only for unpaid contract payments, i.e., accounts receivable, rendered uncollectible or remaining uncollected by the insured from Pemex because of commercial and convertibility events. These sections included no language which could possibly be construed to extend beyond credit losses to indemnification of equipment losses.

Appellees rely on portions of Coverage B(2.) "Other Political Risks" for their position that the policy covered the value of expropriated mobile assets. Coverage B(2.) stated:

> 2. Other Political Risks
>
> a. Eximbank will indemnify the Insured in United States dollars for the percentage stated in the Declarations of the amount of the Insured's loss incurred in connection with covered services following the occurrence, after commenement of services, of any of the following events:
>
> (1) [revocation of export license]; or
>
> (2) the cancellation, under circumstances not due to the fault of the customer or any of its agents, of previously issued and valid authority to import into or to perform such services, or the equipment and material necessary to render the services, in the customer's country; or
>
> (3) the imposition of any law or of any order, decree or regulation having the

force of law or any other governmental action of a like nature which, under circumstances not due to the fault of the customer or any of its agents, prevents the import into or the performance of such services in the customer's country.

b. Eximbank will indemnify the Insured in United States dollars for the percentage stated in the Delcarations of the amount of the Insured's loss incurred in connection with covered services and caused by:

(1) the occurance after commencement of services of any of the following events:

(a) war [and other similar] disturbance[s]; or

(b) requisition, expropriation or confiscation of or intervention in the business of the customer or guarantor by a governmental authority occurring on or before the due date; or

(c) the imposition of any law or of any order, decree or regulation

> having the force of law which, under circumstances not due to the fault of the customer or any of its agents, prevents the deposit described in Coverage B, paragraph 1, from being made; ***

(All emphasis in original.)

While the foregoing language may be slightly ambiguous, (see, e.g. the reference to equipment in subsection 2.a.(2) and to expropriation or confiscation in subsection 2.b.(1)(b)) the key to the nature and extent of the insurer's liability lies in the definition of "loss."[4] "Loss," as defined in the definitions section of the policy, meant with respect to fully performed services, the "contract payment" value less certain offsets.[5] "Contract payment" referred to the contract price in United States dollars owed by the insured's customer for the services rendered by the insured. Thus, the

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[4] See footnote 3.

"loss" for which the insured was indemnified under Coverage B(2.) was intended to be measured by the dollar amounts owed to the insured under its contract with its customer when political events (e.g., war or confiscation) resulted in nonpayment of the contract price.

Considering the contract in its entirety, an interpretation of Coverage B which limits Eximbank's exposure to reimbursing the insured's uncollectible accounts receivable is consistent with the character of coverage unambiguously established in Coverage A. Similarly, a common sense reading of the policy indicates that the

---

[5] Similarly, with respect to partially performed services (in the event of contract interruption by commercial or political events not the fault of the insured), "loss" meant the "contract payment" less the value of unperformed services, partial payments already made, expenses saved and discounts.

single definition of "loss" in the definitions section had the same meaning for Coverages A, B(1.) and B(2.), although loss of accounts receivable could be triggered by different kinds of events or "risks."

Furthermore, credit insurance policies typically cover only overdue or uncollectible accounts and do not provide asset protection coverage. See 9 J. APPLEMAN, INSRUANCE LAW AND PRACTICE § 5241, at 126-27 (1981), describing credit insurance as follows: "It relates strictly to indemnification of the insured for certain types of overdue accounts, particularly where insolvency of the debtor is concerned * * *. [It is] usually purchased by manufacturers or sellers of products to insure that the sudden insolvencies, or failures to pay on the part of purchasers, will not wholly strip them of operating capital and put them out of business."

See also Manhattan Factoring Corp. v. Orsburn, 385 S.W.2d 785, 789 (Ark. 1965): "The business of credit insurance (originally called 'commercial insurance') has existed for many years. The usual form is that for a stated premium paid by the insured, the insurer guarantees the payment, in whole or in part, of the account which the insured has listed under the policy."

The manner in which the premium was computed and its amount are also circumstances to be considered in determining the character of the risk which the parties intended the insurer to assume. 9 J. APPLEMAN, supra, §5241, at 129-30. Accord U.P. Terminal Federal Credit Union v. Employers Mutual Liability Insurance Co., 172 Neb. 190, 196-97, 109 N.W.2d 115, 119 (1961). Premium costs for the Eximbank policy were expressly tied to accounts receivable. Bennett agreed to pay premiums

based on a percentage of one-half of one percent of the aggregate contract payment value of the covered services (i.e., of the insured transactions). The policy required him to prepare monthly reports of his gross invoice value from which premium payments were calculated at the rate of $.50 per $100 of then outstanding debt owed to the insured by Pemex. The premiums bore absolutely no relationship to the value of the trucks to be used in the hauling operations.

In addition, the policy limites were based on Bennett's anticipated billings, not on the value of equipment used in the insured transactions. Bennett chose a policy limit of $600,000, representing the maximum in receivables he expected to have outstanding at any particular time during the transport operations.

In fact, the services for Pemex grossed only $33,000 during the eight months of

operations, resulting in a fee of $166.13 to which an additional $83.87 was added to meet the minimum annual premium of $250 to keep the policy in force. As opposed to the $250 premium which Bennett actually paid for the Eximbank policy, Bennett's insurance agent had received a quotation from a competing insurance group, American International Companies, which did offer expropriation insurance. The annual premium for the American International Companies' expropriation coverage was quoted at $4,894 for Bennett's ten trucks valued at $750,000. The premium for expropriation coverage by American International Companies was calculated as a percentage of the actual cash value of the equipment less the insured's deductible and was unrelated to receivables. Similarly, the liability limit was expressly tied to the value of the equipment, unlike the Eximbank policy.

While we are charged with resolving policy ambiguities in accordance with the reasonable expectations of the insured, Auto-Owners Insurance Co. v. Jensen, 667 F.2d 714, 721 (8th Cir. 1981), Bennett and his insurance agent concededly never even read the Eximbank policy before purchasing it. Had they done so, they would have been alerted by subsection IV.C., "Limitations of Liability," that "* * * the amount of the Insurer's liablity with respect to any one customer [would] in no event with respect to either Coverage A or Coverage B exceed the value of the contract payment, with respect to which the loss has occurred [plus certain costs] * * *." Once again, this provision linked liability to receivables.

Robert L. Charamella, Deputy Vice-President of the export division of Eximbank testified that Eximbank and FCIA offer insurance to United States exporters

of goods and services covering billing invoiced by the exporters to their overseas customers, but that neither Eximbank nor FCIA offers any policy covering the exporters' loss of plant or equipment.[6] According to Charmella, other government agencies, e.g., the Overseas Private Investment Corporation, have programs which

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[6] In an exchange with the district court, Charamella explained the only circumstance in which the value of expropriated equipment would be covered by an Eximbank/FCIA policy:

> THE COURT: Do you have any policies that cover the equipment?
>
> CHARAMELLA: No, sir.
>
> THE COURT: In other words, the equipment is -- let's just say it's expropriated -- it's confiscated when it's down there. There is no policy -- in your view, this policy doesn't nor do you understand that Exim provides any coverage against that political risk?
>
> CHARAMELLA: Not so long as the equipment is still in the exporter's hands. It still -- the title remains with the exporter. If the title of the goods

insure investments in tangible assets overseas as do private insurers, but not Eximbank or its agent FCIA. Nor does Eximbank offer overseas kidnap and ransom coverage which is available privately such as from American International Companies.

Footnote 6 continued:

> are with the foreign buyer and the products are expropriated by the government and that expropriation leads to an inability of the buyer to pay the invoices, then that particular event is covered. The cover relates to billing invoices. If the exporter has equipment in the country, the Export-Import Bank has no policy which covers the exporter against expropriation of the equipment while it's in the foreign country.
>
> THE COURT: I'm having trouble with that. You mean that the Americans, the people who own and have the title to it, if their property is confiscated there's no insurance -- that's not a political risk as far as you're concerned?
>
> CHARAMELLA: That's correct.

(Emphasis added.)

Thus, Eximbank's "comprehensive" export credit insurance contemplates a multitude of possible events, commercial or political, which could precipitate an insured's credit losses abroad, but does not provide comprehensive coverage for noncredit kinds of losses.

John Willyard, a vice-president with FCIA during 1980-81, similarly explained the character of credit insurance available from FCIA:

> FCIA's insurance is designed to protect a company's receivables. And receivables in this case would have been the billings for services actually performed under the contract. Now, receivables can be confiscated, expropriated and nationalized through the buyers being confiscated, expropriated or nationalized or in some other way an eligible claim could occur. However, in the sense of having mobile assets confiscated, expropriated or nationalized, we do not deal in any sort of what we call fixed assets, mobile equipment, overseas plant or other types of fixed assets that might be subject to confiscation, nationalization or expropriation overseas.

Having considered the language of the

insurance policy and the extrinsic evidence bearing on the parties' intent concerning the nature and extent of coverage, the miniscule premium paid and Bennett's rejection of an opportunity to purchase insurance relating to confiscation of equpment at a much higher price, we conclude that the district court erroneously interpreted the policy. We have also considered appellees' other contentions regarding fraud and admissions by a party opponent and find them to be without merit.[7] Accordingly, we reverse and remand with directions to dismiss the complaint with prejudice.

LAY, Chief Judge, concurring.

Because I believe that the insurance policy terms unambiguously exclude from

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[7] In addition, appellees' motion to strike portions of appellant's reply brief is denied. This case was decided without reference to the deposition testimony reproduced in the brief.

coverage the trucks seized by the Mexican government, I agree that the judgment of the district court should be reversed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 85-1866/2155-EA

Enterprise Tools, Inc. & E.B. Bennett,	*	
Appellees, vs.	*	Appeals from the United States District Court for the Eastern District of Arkansas.
Export-Import Bank of the United States,	*	
Appellant.	*	

Appellees' petition for rehearing en banc has been considered by the Court and is denie

Petition for rehearing by the panel is also denied.

October 2, 1986

APPENDIX C

FINDING OF FACTS AND CONCLUSIONS OF LAW

THE COURT: Good morning.

Enterprise Tools, Incorporated and E. B. Bennett versus the Export-Import Bank of the United States, LR-C-82-89. Well, I have been up since 4:00 this morning. I have read over my prior findings, the argument, the briefs, and the submissions made by the parties in the last few days, including proposed findings of fact and conclusions of law.

I have come to certain conclusions that will affect the structure of the hearing this morning. First, let me ask if the plaintiffs are ready to proceed with the hearing.

MR. SHAMBURGER: Plaintiffs are ready, Your Honor.

THE COURT: And the defendant?

MS. LILES: Yes, Your Honor.

THE COURT: Now the plaintiffs has submitted proposed findings of fact and conclusions of law and I have glanced over them and I thought I would go through because I think a great number of them track and are in keeping with the findings that I have heretofore stated during the course of the argument or after the argument or at the conclusion of the case. And in essence I am going to tell you that I am accepting many of these findings of fact as simply restatement of ones that I have already made.

That is, plaintiff's findings of fact Nos. 1, 2, 3, 4, 5, 6, the first sentence of 7A, 7B, 7C, 7D; finding No. 8, 9, 10, 11, 12, 13, 14, 15, the first part of the first sentence of 16 down to where -- I'll just read it. "The political coverage paragraph II(b) of policy number CV-0085 also covers the 'cancellation of ... valid authority and the interference with plaintiffs' service

contract, unquote, with Pemex. -- 17, 18, 19, 20, 22 down to the third to last line that ends "as the customer" and put a period there and delete the last two lines which starts "and approved the final service contract." I have already indicated that the plaintiffs will be awarded interest, but that figure has yet to be determined.

Now I think you may have surmised by what I have said so far what I'm coming to. The defendant's agreement did insure the plaintiff against the losses it could prove resulting from its inability due to political interference and confiscation to continue to provide the services contemplated in the agreement with Pemex; but X-M insured against such losses only to the extent of the terms of the Pemex agreement which were disclosed and made known to it, X-M. ...

Now since the Court intends, therefore,

to confine this hearing to evidence concerning the loss of the value of the trucks and the trailer rigs, I also doubt it would be necessary to construe the excess political coverage endorsement or to determine if that endorsement read in connection with endorsement 2(e) would have the effect of deleting or removing the $600,000.00 aggregate limit as contained in the original reclarations. I have already expressed my attitude towards this contract on the record. It is the worst insurance contract I have ever seen. It's one of the poorest contracts I have ever seen and if one were to assume and accept the Government's theory of this case, it would almost have to be interpreted as a fraud. In other words, that it is to suggest that it provides coverage that was never intended. I don't think that is correct. I think there was an intent to provide coverage. The testimony

of some of the Government witnesses indicates that that is so. They have since changed their mind. I am beginning to wonder why, but I am confident that the policy does provide the coverage that I have indicated as properly construed under the principles of law that we have to apply here.

(The following are those of plaintiffs proposed formal findings of fact which are adopted by the Trial Court).

FINDING OF FACT

1. Plaintiffs' agent carefully explained the factual situation with respect to the parties, the identity of the people involved, the relationship of Pemex, the whole nature of the business plan to the agent (FCIA) of Export-Import Bank of the United States and that plaintiffs made known, suggested and requested coverage which would cover confiscation and other political risks.

2. Policy No. CV-85 was issued by FCIA on the 30th day of March, 1980 in favor of the Plaintiffs, Enterprise Tools Inc., and E. B. Bennett, Jr.

3. At all times material hereto the aforesaid Comprehensive Services Export Credit Insurance Policy was in full force and effect and provided under Coverage A for Commercial Credit Risks and under Coverage B for Political Risks.

4. Plaintiffs policy could have been renewed and extended through May 31, 1983 which is the date of last shipment as stated by the defendant.

5. The defendant was aware that the parties contemplated a long ongoing relationship by virtue of the application noting that the contract was perpetual.

6. Plaintiffs' operation was invited by Pemex, it was set up by Pemex officials and promoted by them.

7. (a) The "Service Contract" with Pemex related to ten (10) vehicles, for which numbers had been reserved in the official register.

(b) That plaintiffs imported, and provided only six (6) complete rigs which had been tested, inspected and met the quality, safety and transporation and hauling capability requirements of Mexico and Pemex.

(c) Plaintiff, under the service contract had committed these six (6) rigs to Pemex for the exclusive service of Pemex, any where in the National territory of Mexico. Plaintiff was not free to choose the time and place of service nor could plaintiff elect to use the equipment for any other purpose, that plaintiff might desire.

(d) Entry, license and permit requirements had been met and handled

primarily at the direction of Pemex and with the assistance of Pemex.

8. The government of Mexico through its Agency Dina had a policy to protect domestically manufactured equipment.

9. That the Mexican government, when their domestic manufacturers and agency, Dina could not meet the need for tractors and trailers of the type imported by plaintiffs, the government would relax its position and permit not just the importation on a temporary permit, but the domestication of foreign made tractors and trailers.

10. That the government of Mexico changed its policy with regard to such temporary importation and domestication which caused plaintiffs' permits to be cancelled.

11. The Mexican government cancelled through no fault of the plaintiffs or Pemex, previously issued, valid authority for plaintiffs to import into and perform the

covered services for Pemex by operating their tractor-trailers on the highways of Mexico, hauling Pemex products.

12. The cancellation of valid authority occurred on or about August 25, 1981, before the expiration of such valid authority to import, so operate and perform such services.

13. Property and equipment of the plaintiffs were seized and confiscated by agencies of the government of Mexico on August 25, 1981 through no fault of the plaintiffs' or its customer Pemex. Confiscation and impoundment of plaintiffs' equipment was confirmed by California Commerce Bank's Parent, Bank, Banamex in Early 1982 when they sought to repossess and sell the trailers.

14. That the conduct described in paragraphs 11, 12 and 13 above was covered under the "political risk" portion of the

defendant's policy of insurance No. CV-0085, issued to Plaintiffs.

15. The Political Coverage paragraph (II B of policy No. CV-0085) covers the loss of plaintiffs' tractors and trailers in accordance with ordinary principles of the law of damages and the measure is the fair market value at the date of appropriation which is August 25, 1981.

16. The Political Coverage paragraph II B of Policy No. CV-0085 also covers the "cancellation of ... valid authority" and the interference with plaintiffs' "Service Contract" with Pemex.

17. The policy of insurance here involved is ambigious, contradictory and misleading.

18. The Export-Import Bank of the United States of America is an agency of the United States Government.

19. The Court has determined that for the purpose of this lawsuit proof of loss or a claim was filed December 17, 1981.

20. That Jack Lindsey was authorized by Plaintiff to sign acceptance of the policy, and did so. He was supplied with a copy of the policy and was mailed copies of the first 4 endorsements including 1E and 2E by letter of April 13, 1981.

22. The defendant's agent (FCIA) was supplied copies of the three-cornered contractual arrangement, with plaintiff, Cavazos - Gas Transport and Pemex, which the Court finds to be the "Service Contract" as defined in the policy. Defendant reserved the right to approve the final contract between the insured and the customer; made inquiry and received plaintiffs' explanation concerning how Pemex was described as the customer.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ENTERPRISE TOOLS, INC.,
and E.B. BENNETT PLAINTIFFS

v. No. LR-C-82-89

THE EXPORT-IMPORT BANK
OF THE UNITED STATES DEFENDANT

ORDER

Pending before the Court is the plaintiffs' motion for attorney fees pursuant to the Equal access to Justice Act, 28 U.S.C. §2411(d). The Court will grant the plaintiffs' motion for the reasons explained below.

I. Substantial Justification

The issue at trial was the interpretation of an insurance policy. The plaintiffs, Enterprise Tools, Inc., and E.B. Bennett, president of Enterprise Tools, sought to recover upon an insurance policy

in which defendant Exim Bank was the insurer with respect to certain risks. Plaintiffs had moved six tractor-trailer rigs into Mexico which were used to haul liquified petroleum gas between the Pemex Refinery and two cities in Mexico, Reynosa and Guadalajara. According to the allegations in the complaint, plaintiffs encountered no serious difficulties until Mexican authorities declined to renew their operating licenses and permits for the tractor-trailer rigs in Mexico and also refused to issue license or authority for plaintiffs to move additional equipment into Mexico. The plaintiffs further alleged that they were not allowed to remove or protect any of their rigs or to continue business operations in any way. Having incurred losses, plaintiffs demanded recovery on their insurance policy.

Exim denied liability. Exim's view of the facts differed greatly from that of the plaintiffs. They argued that the Mexican government never changed its policy, that there was no confiscation of the plaintiffs' rigs and that plaintiffs had willfully abandoned their property. Exim further argued that the insurance policy only covered losses on "accounts receivable" and that it did not provide coverage for political losses even assuming arguendo that this was such a loss.

On the factual issues, the Court held for the plaintiffs; finding that political decisions and interference prevented Enterprise Tools from using, moving or otherwise availing themselves of their equipment. Regarding the interpretation of the insurance policy, the Court found that the policy did cover the loss of the rigs and awarded damages to the plaintiff for

them. The Court made the following statement concerning the insurance policy at issue:

> It is the worst insurance contract I have ever seen. It's one of the poorest contracts I have ever seen and if one were to assume and accept the government's theory of this case, it would almost have to be interpreted as a fraud. In other words, that it is to suggest that it provides coverage that was never intended. I don't think that is correct. I think there was an intent to provide coverage. The testimony of some of the government witnesses indicates that that is so. They have since changed their mind. I am beginning to wonder why, but I am confident that the policy does provide the coverage that I have indicated as properly construed under the principles of law that we have to apply here.

Before the Court can deny the motion for attorney fees, the defendants have the burden of proving that the "position of the United States" is substantially justified. Foley Construction Co. v. United States Army Corps of Engineers, 716 F.2d 1202, 1204 (8th Cir. 1983), cert. denied, 104 S. Ct. 1908 (1984). In this circuit, the "position of the United States" includes the

government's position at both the prelitigation and litigation states. Iowa Express Distribution v. NLRB, 739 F.2d 1305, 1309 (8th Cir. 1984), cert. denied, 105 S. Ct. 595 (1984). In determining the justification of this position, the question is "essentially one of reasonableness in law and in fact." Foley, 716 F.2d at 1204; see H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10, reprinted in 1980 U.S. Code Cong. & Ad. News 4984, 4989.

In resisting the award of attorney fees, Exim Bank simply reiterates the position it took at trial, without explaining why this position which the Court found to be almost totally lacking in merit was substantially justified. An appropriate response in this situation would be for the government not to reargue its position, but

to explain why its position is reasonable both in law and in fact.[1]

In regard to the factual disputes, the parties presented entirely different versions of the facts. A reasonable response to this conflict would have been for the government to conduct discovery to prove their theory of what in fact had happened to the rigs. Instead, Exim used the considerable force and influence of the government to make it difficult for the plaintiffs to establish facts which should have been easy for the government to determine. For example, after the confiscation of the trucks, the plaintiffs maintained their initial contacts in Mexico and were in the process of locating the rigs. After the

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1 See Keasler v. USA, No. 84-1904, slip op. (8th Cir.July 3, 1985), as an example of the variation in argument that occurs when the issue to be resolved is attorney fees as opposed to the merits of the case.

government became involved with these same contacts, all communication between plaintiffs and these contacts ceased. Although it is not entirely clear why, it is clear that acts of the government agents did in fact disrupt communication between plaintiffs and its Mexican contacts.

Quite unbelievably this was the extent of the government's efforts to disprove the plaintiffs' case. By the day of the trial on the issue of liability,[2] the government had made no efforts to discover the whereabouts of the rigs. Obviously the defendant's theory was, "We are right and you cannot prove otherwise." The Court finds such position to be patently unreasonable.

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[2] The trial was bifurcated. The issue of liability was tried on February 1, 1985, and lasted 5 days. The damage issue was heard on May 16, 1985, and lasted 5 hours.

This same high-handed attitude permeated the government's position in regard to other issues in the trial. The Court labeled this insurance contract "the worst it had ever seen." Throughout the three-year history of this case, the defendant had adamantly ignored the blatant problems arising from a plain reading of the entire contract and has persisted in isolating certain portions to deny liability. Exim summarizes its position accurately in its brief in opposition to this motion wherein it states: "In taking the position it did on this case, defendant relied . . . upon <u>its</u> interpretation of the policy." (emphasis added).

It is this very situation that the award of attorney fees under the EAJA is intended to remedy. Exim received a claim on a policy it prepared that was simply not tailored to the circumstances. It took

untenable positions upon the interpretation of the contract especially in the light of the obvious expectations of the parties. It chose to litigate in order to prove its "no political coverage" interpretation. Having lost, the govenment must now bear the cost of this effort.[3] The fee-shifting provision should be used to help make the plaintiffs whole for the inordinate expenses and costs it has been forced to incur because of the positions taken by the government both pre-trial and during the trials of both phases of this case.

The purpose of the EAJA has been explained as follows:

> In 1980, Congress passed the Equal Access to Justice Act as an innovative

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[3] See Keasler v. USA, No. 84-1904, slip op. at 22 (8th Cir. July 3, 1985), where in the court states" ...[I]f the government chooses to embark on such an escapade in a case like this, it should be prepared to pay the piper."

> experiment in using attorney's fees awards toward a new and pressing end-that of ensuring administrative accountability. Congress feared that parties with limited resources were too often being coerced into compliance with government orders, discouraged by the high costs of litigation and the far greater resources behind government litigators from bringing even the most meritorious suits against governmental agencies. Allowing such governmental actions to go unchallenged, Congress feared, would only increase the danger that agencies would act arbitrarily, already a serious threat in an age of rapidly expanding administrative regulation. Thus, the prospect of fee awards for victorious private parties in suits against the government was intended to act as both an incentive to such challenges and a disincentive to unreasonable governmental actions in the first instance.

Note, Reenacting the Equal Access to Justice Act: A Proposal for Automatic Attorney's Fee Awards, 94 Yale L.R. 1207, 1208 (1985).

In regard to the damage portion of the trial, the Court accepts and adopts the argument in plaintiffs' brief pertaining to the issue of damages, and finds that the government's position in assessing the value of the trailer-rigs was not reasonable.

Finally, the Court finds that there are no special circumstances that would make an award of attorney fees to the plaintiffs unjust.

II. COMPUTATION OF THE FEE.

The plaintiffs' attorney have submitted a fee application itemizing 2,159.45 hours expended on this case. Defendants have made four specific objections to the plaintiffs' attorney fees application.

First, the defendant argues that plaintiffs are not entitled to attorney fees for work done prior to litigation. Plaintiff responds by stating that a portion of the initial work was necessary to exhaust the claim at the administrative level. In Cornella v. Schweiker, 728 F.2d 978, 988 (8th Cir. 1984), the Eighth Circuit Court of Appeals stated that "the EAJA covers only an 'adversary adjudication.' An 'adversary adjudication' is defined as one which is

'determined on the record after an opportunity for an agency hearing,' 5 U.S.C. 554, where 'the position of the United States is represented by counsel.'"

The Court of Appeals explained the Congress intended to eliminate administrative proceedings where the United States is not represented by counsel from EAJA coverage. Accordingly, this Court will eliminate the 11.35 hours that were expended prior to drafting the pleadings as it appears that those hours were expended in connection with a nonadversarial proceeding.

Defendant's second argument is that plaintiffs are not entitled to an award of attorney fees or expert witness expenses on the issue of lost profits. The Court finds that the additional proof on lost profits was very minor that the time expended by the attorneys in pursuing coverage under the policy for the tractor-trailor rigs cannot

be practicably separated from the time spent on lost profits.

The court does agree that the $4,165 payment to H. Curtis Terrell can be said to represent an expense in connection with lost profits only and will deduct that amount from the attorney fee award.

The defendant also asks that the Court not award to plaintiffs the cost of Inter-Americans Consulting Group, Inc., for investigative work in Mexico. The Court rejects this request and finds that the investigative work done by the Consulting Group was necessary to prevail on the coverage of the rigs and same will therefore be included in the award.

Exim's third argument is that plaintiffs are not entitled to attorney fees unrelated to the litigation of this case. Specifically, defendant asks that the Court

delete from its award all time spent soliciting the help of members of Congress to seek the cooperation of Eximbank. Although the Court can understand the frustration that led to these political contacts, it does not believe that the effort to obtain Congressional assistance is compensable and therefore will deduct the 23.90 hours on this effort from the award.

Finally, Exim argues that plaintiffs' attorneys have not made a showing that they are entitled to more than $75 an hour. The Court finds that the quality of representation in this case would command fees in excess of $75 an hour in this marketplace. However, given the statutory restriction that fees in excess of this amount not be awarded absent "special circumstances," the Court will set the hourly rate at $75 an hour.

The Court accepts the plaintiffs' itemization of fees and costs in all other

respects and directs the plaintiffs to submit a judgment in conformity with this opinion.

In conclusion, the Court observes that the plaintiffs have been met with formidable opposition at every stage of this litigation. If the fee award seems expensive to the defendant, it must remember that the effort and work required by the plaintiffs was a direct consequence of the effort, strategy and contentiousness of the defendant.

Dated this 26th day of August, 1986.

(Garnett Thomas Eisele)
United States District Judge

APPENDIX E

ENTERPRISE TOOLS, INC.
E.B. BENNETT — PLAINTIFFS

LITTLE ROCK MACK SALES
and SERVICE, INC., — INTERVENOR,

v.

EXPORT-IMPORT BANK
OF THE U.S. — DEFENDANT

No. LR-C-82-89

United States District Court,
E.D. Arkansas, W.D.

June 3, 1983

ORDER

EISELE, Chief Judge.

Pending before the Court is the motion to dismiss this case filed by the defendant Export-Import Bank of the United States ("Eximbank"). For the reasons stated below the motion will be denied.

In their complaint, the plaintiffs allege the following set of facts. In 1981 they procured a policy of insurance from Eximbank through its licensed agent in the

State of Arkansas. The purpose of the policy was to provide insurance coverage for the plaintiffs' petroleum hauling operations in Mexico. Over a period of time the plaintiff transported ten tractor-trailer rigs into Mexico for the purpose of hauling liquified petroleum within that country for a company called Petroleos Mexicanos. Sometime after operations had been underway, the plaintiffs were informed that they had to cease the hauling because their trucks were not of Mexican manufacture. They were told that they could resume operations upon obtaining Mexican-made equipment. The plaintiffs did not purchase any Mexican-made trucks. Consequently their trucks were seized and they have been unable to recover them. The plaintiffs seek to recover $5,000,000 on the insurance policy issued by Eximbank.

Eximbank relies on three grounds upon which it contends that this case should be dismissed. The first is that service of process was improper in this case because service was made only on an agent for Eximbank, and not on the United States Attorney for the Eastern District of Arkansas as required by Fed.R.Civ.P. 4(d)(5). The issue is now moot, however, in that the plaintiffs served the United States Attorney on April 21, 1982.

The second ground for dismissal proffered by Eximbank is that the plaintiffs have not exhausted their administrative remedies in that they have not filed a Proof of Loss which would allow Eximbank to act administratively on their claim. Apparently, there has been much controversy regarding this Proof of Loss, but it is now clear that the plaintiffs have filed it and that Eximbank has, by letter to the plaintiffs, declined to assume any liability for

the plaintiffs' claim. Therefore, this ground for dismissal is now moot.

The final ground upon which Eximbank relies for its motion for dismissal raises an issue of jurisdiction. Eximbank contends that exclusive jurisdiction over this case is vested in the United States Court of Claims for the reason that this is a contract claim against the United States for money damages in excess of $10,000. The plaintiffs rebut this contention by arguing that the United States is not a party to this lawsuit and that if a judgment is recovered, no funds from the public treasury would need be expended to satisfy it. The Court agrees with the plaintiffs and finds that it has jurisdiction over this cause of action.

Title 28 of the United States Code, § 1346(a)(2), by negative implication, vests

the Court of Claims with exclusive jurisdiction over those cases in which the United States is a defendant and which involve contract claims, not sounding in tort, which allege damages in excess of $10,000. See International Engineering Co., Div. of A-T-O, Inc. v. Richardson, 512 F.2d 573 (D.C. Cir. 1975), cert. denied 423 U.S. 1048, 96 S.Ct. 774, 46 L.Ed.2d 636. Because the damages claimed in the instant case are $5,000,000, the only issue for this Court to resolve is whether this suit is one brought against the United States.

In Lance International, Inc. v. Aetna Casualty & Surety Co., 264 F.Supp. 349 (S.D.N.Y. 1967), the court was confronted with a removal issue involving multiple defendants, one of which was the Export-Import Bank of Washington (the precursor to the Export-Import Bank of the

United States). The district court ultimately remanded the case, but in reaching its decision it found that the case would have been removable if Eximbank had been the sole defendant. This finding was premised on the court's holding that it had jurisdiction over Eximbank and the $124,326.48 claim brought against it. The Court stated:

> If this action were limited to the Export-Import Bank, there could be no question about the latter's right to remove the suit against it to this Court pursuant to 28 U.S.C. § 1441(b), since it would be an action over which this Court would have original jurisdiction founded on a claim or right arising under the laws of the United States. 28 U.S.C. §1331(a). The statute creating the Export-Import Bank expressly provides: "There is created a corporation with the name Export-Import

> Bank of Washington, which shall be an agency of the United States of America." (12 U.S.C.§635) It was long ago established by the Supreme Court that district courts have original jurisdiction over suits against federal corporations, such actions being deemed to arise under the laws of the United States.

Lance International, 264 F.Supp. at 352 (citations omitted).

The court then went on to hold that a suit against the Eximbank is also one not within the exclusive jurisdiction of the Court of Claims.

The suggestion that a suit against the Export-Import Bank is exclusively within the jurisdiction of the Court of Claims (see Harlem River Produce Co., Inc. v. Aetna Cas. & Sur. Co., 257 F.Supp. 160 (S.D.N.Y.1965))

appears to be fully answered by the previously quoted express statutory authorization to it "to sue and to be sued * * * in any court of competent jurisdiction." Furthermore, the Supreme Court has tacitly approved suits against similar corporations in forums other than the Court of Claims. Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784 (1939); see Federal Housing Administation, etc. v. Burr, 309 U.S. 242, 60 S.Ct. 488, 84 L.Ed. 724 (1939); Garden Homes, Inc. v. Mason, 249 F.2d 71 (1st Cir. 1957), cert. denied, 356 U.S. 903, 78 S.Ct. 562, 2 L.Ed.2d 580 (1958).

The current statute which creates the Export-Import Bank of the United States has language identical to its predecessor statute quoted in the Lance International case. Title 12 of the United States Code, §635(a)(1) states: "There is created a

corporation with the name Export-Import Bank of the United States, which shall be an agency of the United States of America ... [T]he bank is authorized and empowered ... to sue and to be sued, to complain and to defend in any court of competent jurisdiction." It would seem therefore that the Lance International case would be dispositive of the issue.

Nevertheless, Eximbank cites the Court to the case of Lomas & Nettleton Co. v. Pierce, 636 F.2d 971 (5th Cir.1981), in which it was held that a $2,500,000 breach of contract claim brought against the Government National Mortgage Association (GNMA) and the Secretary of Housing and Urban Development (HUD) was within the exclusive jurisdiction of the Court of Claims pursuant to 28 U.S.C. §1346. Rather than supporting Eximbank's position, however, the Lomas case conclusively

resolves the issue before this Court and supplies a rationale, absent in the Lance International case, for district court jurisdiction.

In Lomas the court reiterated its previous ruling in Industrial Indemnity, Inc. v. Landrieu, 615 F.2d 644 (5th Cir.1980), that the "sue and be sued" language in the HUD statute, 12 U.S.C. §1702, was "neither a grant of jurisdiction or a waiver of the immunity of the United States generally" such that the suit could be maintained in the district court as opposed to the Court of Claims. Lomas, 639 F.2d at 973. This holding would seem to negate the rule in Lance International since that case relied on identical language in the Eximbank statute in determining that the Court of Claims did not have exclusive jurisdiction in cases brought against Eximbank.

The Lomas court went on, however, and set out the standard by which it is to be determined when a suit against an agency of the United States is in reality a suit against the United States for the purposes of 28 U.S.C. §1346. The court referred to its previous Industrial Indemnity decision wherein it was stated:

> For Industrial Indemnity's claim to be against the Secretary, and therefore within the scope of the "sue and be sued" clause, as opposed to a suit against the United States that could not be brought in federal district court, any judgment for the plaintiff must be recoverable from funds in the possession and control of the Secretary that are severed from Treasury funds and Treasury control.

Industrial Indemnity, 615 F.2d at 646 (footnote omitted) (citations omitted) (emphasis added).

The standard is clear. Where the jdugment sought is to be satisfied from funds in the possession and control of the government agency, and not from funds in the possession or control of the United States Tresury, then the suit is one maintainable against the agency in district court and is not a suit that is within the exclusive jurisdiction of the Court of Claims. In Lomas the court found jurisdiction to be vested in the Court of Claims because the statute relevant to GNMA operations expressly stated that all funds collected and expended by that agency "inure[d] solely to the Secretary of the Treasury." 12 U.S.C. §1722. In Industrial Indemnity, however, jurisdiction was found to be properly vested in the district court because

the judgment against the Secretary of HUD could be paid out of a certain insurance fund "that is a separate fund in the control and possession of the Secretary." Industrial Indemnity, 615 F.2d at 646 (footnote omitted). See also Southern Sog, Inc. v. Roland, 644 F.2d 376, 379 (5th Cir.1981) ("[A] federal district court has jurisdiction of a claim by a private litigant to a fund retained by the Secretary of HUD, the origin of which is not the public treasury.").

The case before this Court involving Eximbank is analogous to the suits maintained against HUD in Industrial Indemnity and Southern Sog and the cases referred to in Lomas. The statutory scheme which creates the eximbank does just that; it creates a fully functional bank vested with the power to "do a general banking business." 12 U.S.C. §635(a)(1). That includes the power to "receive deposits; to

purchase, ... to ... insure ... against political and credit risks of loss," and so forth. Id. Although Eximbank was originally capitalized by the United States, this was done by way of a stock subscription whereby capital was given by the United States to Eximbank in return for shares of Eximbank stock of which certificates evidencing ownership by the United States are issued to the President of the United States or his designee. 12 U.S.C. §635b.

The statute also provides in §635(a)(1) that:

> The bank is authorized to use all of its assets and all moneys which have been or may hereafter be allocated to or borrowed by it in the exercise of its functions. Net earnings of the bank after reasonable provision for possible losses shall be used for payment of dividends on capital stock.

> Any such dividends shall be deposited into the Tresury as miscellaneous receipts.

Finally, §365k of the statute provides the language most pertinent to this case:

> In the event of any losses, as determined by the Board of Directors of the Bank, incurred on loans, guarantees, and insurance extended under sections 635j-635n of this title, the first $100,000,000 of such losses shall be borne by the Bank; the second $100,000,000 of such losses shall be borne by the Secretary of the Treasury; and any losses in excess thereof shall be borne by the Bank.

In conclusion, the foregoing analysis makes it clear that Eximbank is indeed a bank that functions independently of the

general control of the United States Treasury. Eximbank is in control and possession of its own assets and liabilities. It, as a separate entity and from its own assets, is liable for a loss occurring on any insurance it has extended up to $100,000,000. In the instant case, judgment is sought for $5,000,000, a sum which is well below that amount.

Therefore, the Court concludes that it has jurisdiction over this suit pursuant to 28 U.S.C. §1331 and that this suit is not one within the exclusive jurisdiction of the Court of Claims for the reason that if judgment is entered against Eximbank, it would not require satisfaction from the public treasury.

It is therefore Ordered that the defendant's motion to dismiss be, and it is hereby, denied.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ENTERPRISE TOOLS, INC.,
and E.B. BENNETT PLAINTIFFS

v. No. LR-C-82-89

THE EXPORT-IMPORT BANK
OF THE UNITED STATES DEFENDANT

ORDER

Pending before the Court is a motion for summary judgment, filed by defendant, The Export-Import Bank of the United States ("Export Bank"). For the reasons given below the motion will be denied.

Plaintiffs, Enterprise Tools, Inc., and E. B. Bennett ("Enterprise Tools") had a contract to haul petroleum products for PEMEX. The Mexican government changed the existing regulations and practices relating to imports of heavy transportation equipment

and this change resulted in the cancellation of operating permits and licenses of the plaintiffs. Plaintiffs were threatened with jailing if they moved or attempted to move their equipment. Consequently, plaintiffs could not complete their executory contract with PEMEX and their equipment was seized.

Plaintiffs then attempted to recover their losses from their insurer, Export Bank. When Export Bank denied coverage, plaintiffs filed this lawsuit.

Export Bank has filed this motion for summary judgment arguing that the insurance policy does not cover the type of loss sustained by the plaintiffs and that the policy language is unabiguous in its denial.

In Parish v. Howard, 459 F.2d 616, 618 (8th Cir. 1972), the Eighth Circuit stated that "unambiguous" contracts are appropriate subjects for summary judgment. The Court agrees with the plaintiffs' assertion that

the insurance policy is not free of ambiguity and, indeed, is open to varying interpretations. Parole evidence may be permitted to make clear the intention of the parties. It simply cannot be said at this point that there remain no genuine issues of material fact.

It is therefore Ordered that the defendant's motion for summary judgment be, and it is hereby, denied.

Dated this 21st day of February, 1984.

(Garnett Thomas Eisele)
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ENTERPRISE TOOLS, INC.,
and E.B. BENNETT — PLAINTIFFS

v. No. LR-C-82-89

THE EXPORT-IMPORT BANK
OF THE UNITED STATES — DEFENDANT

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law stated orally from the bench in open court at the conclusion of the liability trial, during and after oral argument at the end of that trial and at the commencement and at the conclusion of the damage trial,

IT IS ORDERED AND ADJUDGED that plaintiffs, Enterprise Tools, Inc. and E. B. Bennett, have and recover of the defendant, The Export-Import Bank of the United States,

judgment in the sum of Four Hundred Ninety-two Thousand and no/100 Dollars ($492,000.00) with pre-judgment interest thereon at six percent (6%) from March 17, 1982 until this date in the amount of Ninety-three Thousand Four Hundred Eighty and no/100 Dollars ($93,480.00), making the total of said judgment the sum of Five Hundred Eighty-five Thousand Four Hundred Eighty and no/100 Dollars ($585,480.00), together with interest from this date until paid at the rate of eight and 57/100 percent (8.57%) as provided by law, and for their costs expended of this action.

Dated this 17th day of May, 1985.

Garnett Thomas Eisele
UNITED STATES DISTRICT JUDGE

No. 86-1110

In the Supreme Court of the United States

OCTOBER TERM, 1986

ENTERPRISE TOOLS, INC. AND
E. B. BENNETT, PETITIONERS

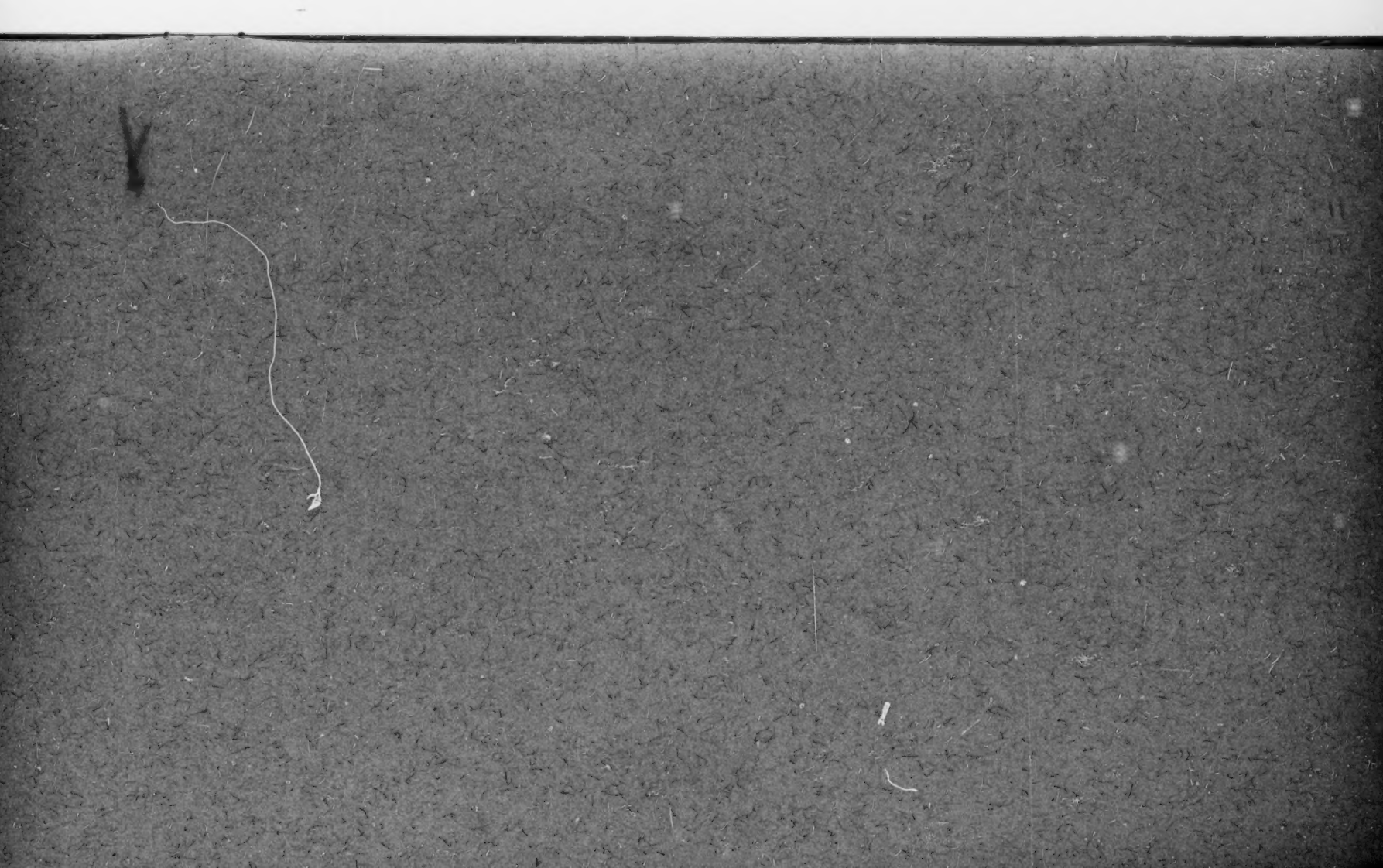
v.

EXPORT-IMPORT BANK OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217



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No. 86-1110

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v.

EXPORT-IMPORT BANK OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners contend that the court below applied an improper standard of review in setting aside the district court's determination that their insurance policy with respondent covers certain trucks that the Mexican government expropriated.

1. Petitioners, E.B. Bennett and his wholly owned company, Enterprise Tools, Inc., provide petroleum hauling services for oil-producing companies (Pet. App. 2a). In 1980, they contracted with Petroleos Mexicanos (Pemex), the Mexican government's wholly owned oil-producing company, to haul liquified petroleum gas between Pemex's refinery and two cities in Mexico (*id.* at 2a-3a, 2d). Petitioners purchased a "comprehensive services export credit insurance policy" from respondent, the Export-Import Bank of the United States (Eximbank), in connection with these petroleum hauling operations (*id.* at 2a).

Within a year after petitioners purchased this policy and began hauling petroleum products for Pemex, the Mexican government seized and expropriated six of petitioner's trucks (Pet. App. 3a, 7c). When petitioners were unable to secure return of the vehicles, they filed a claim with Eximbank under the aforementioned insurance policy to recover the value of the trucks (*id.* at 3a). Eximbank denied petitioners' claim, stating that the insurance policy covers only credit losses caused by expropriation or other hazards, and does not cover the value of assets that are themselves expropriated by a foreign government (*id.* at 3a-4a).

Petitioners instituted this action against Eximbank in the United States District Court for the Eastern District of Arkansas seeking to recover the value of the expropriated trucks. After a trial, the district court found that "the policy of insurance here involved is ambiguous, contradictory and misleading" (Pet. App. 10c). The court ultimately concluded that petitioners' confiscated trucks were "covered under the 'political risk' portion of the defendant's policy of insurance" (*id.* at 9c-10c).[1]

The court of appeals reversed, concluding that "the policy did not provide coverage for the value of the insured's confiscated equipment" (Pet. App. 4a). The court began its analysis by describing the principles of interpretation that "apply to the construction of insurance policies" (*ibid.*). It observed that "resort to extrinsic evidence is appropriate to resolve ambiguities." It added,

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[1] The district court did not issue a written opinion in this case. Rather, it partially adopted petitioners' proposed findings of fact and made some contemporaneous remarks from the bench. Petitioners have reprinted some of these findings and remarks in Appendix C to their petition for a writ of certiorari. We note, however, that the titles, "Finding[s] of Fact and Conclusions of Law" and "Finding[s] of Fact," which appear at Pet. App. 1c and 5c, do not appear in the transcript. They have been added by petitioners.

however, that the question "[w]hether an insurance contract is ambiguous is a question of law. Policy language is ambiguous if it is 'reasonably susceptible of two interpretations' " (*id.* at 4a-5a (citation omitted)). But "where a term is defined in the policy, the court is bound by the policy definition" (*id.* at 5a). Thus, "[w]hile ambiguities are to be construed in favor of the insured," the court concluded, "a court may not rewrite the contract" (*ibid.*).

The court then applied these interpretative principles to petitioners' insurance policy with Eximbank. Pet. App. 5a-14a. It noted that the policy has two parts, one covering "commercial credit risks," the other covering "political risks" (*id.* at 5a). The "commercial credit risk" part of the policy, the court found, unambiguously indemnifies the insured only for unpaid contract payments (*id.* at 9a). The court stated that certain phrases in the "political risk" part of the policy, viewed in isolation, "may be slightly ambiguous" in that they refer to "equipment" and to "expropriation or confiscation" (*id.* at 12a). But the court held that "the key to the nature and extent of the insurer's liability," under both parts of the policy, "lies in the definition of 'loss,' " a term that is defined, for purposes of the policy generally, as the value of the "contract price" less certain offsets (*ibid.*). The court accordingly construed the "political risk" part of the policy to indemnify the insured, not against the loss of expropriated assets, but against the loss of contract payments occasioned when expropriation or other political hazard results in nonpayment of the contract price (*id.* at 12a-13a). This interpretation of the "political risk" part of the policy, the court observed, "is consistent with the character of coverage unambiguously established" in the "commercial credit risk" section (*id.* at 13a). Thus, "[c]onsidering the contract in its entirety" (*ibid.*), the court held that the policy covered only the insured's uncollectible accounts receivable and not its expropriated trucks.

The court further found that the extrinsic evidence in the record buttressed this conclusion. Pet. App. 14a-22a. It pointed out that "credit insurance policies typically cover only overdue or uncollectible accounts and do not provide asset protection coverage" (*id.* at 14a). Moreover, it noted that petitioners' "premiums bore absolutely no relationship to the value of the trucks to be used in hauling operations" (*id.* at 16a), and that "the policy limits were based on petitioners' anticipated billings, not on the value of equipment used in the insured transactions" (*ibid.*). By contrast, the court noted, petitioners' "insurance agent had received a quotation from a competing insurance group * * * which did offer expropriation insurance" and which "expressly tied [the annual premium and liability limits] to the value of the equipment" (*id.* at 17a). Finally, the court noted, Eximbank does not even "offer[] any policy covering the exporters' loss of plant or equipment" (*id.* at 19a).

Thus, "[h]aving considered the language of the insurance policy and the extrinsic evidence," the court of appeals concluded "that the district court erroneously interpreted the policy" (Pet. App. 21a-22a). Accordingly, it reversed and remanded with instructions that the case be dismissed with prejudice (*ibid.*). Chief Judge Lay concurred separately, finding that "the insurance policy terms unambiguously exclude from coverage the trucks seized by the Mexican government" (*id.* at 22a-23a).

2. The decision below is correct. It does not conflict with any decision of this Court or with the decision of any other court of appeals. Accordingly, review by this Court is not warranted.

a. Petitioners first contend (Pet. 9-16) that the decision below conflicts with this Court's decision in *Icicle Seafoods, Inc.* v. *Worthington*, No. 85-195 (Apr. 21, 1986). This contention is plainly wrong. The court of appeals there had held that the district court had applied an improper legal standard in determining that certain em-

ployees of a maritime company were "seamen" within the meaning of 29 U.S.C. 213(b)(6). Rather than remand the case so that the district court could apply the correct legal standard to the evidence in the record, however, the court of appeals independently reviewed the evidence and held, as a matter of fact, that the employees were industrial maintenance workers, and not seamen. This Court reversed, holding that the appellate court should have remanded the case so that the district court could have applied the correct legal standard to the evidence in the first instance. See slip op. 4-6.

Icicle Seafoods clearly has no bearing on this case. Here, the court of appeals did not make any independent factual findings. Rather, it reached an independent conclusion of law, to wit, that the Eximbank insurance policy unambiguously insures only accounts receivable, and not assets. Because the court of appeals' decision was grounded upon the language and structure of the policy, and because the construction of an unambiguous insurance policy is a question of law governed by a de novo standard of review, the *Icicle Seafoods* decision has nothing to do with this case.[2]

Even if the court of appeals' conclusion were thought to be factual in nature, hinging not upon appraisal of the policy's language but upon evaluation of extrinsic evidence, the decision below would still be correct under

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[2] Petitioners err in asserting (Pet. 16-18) that the court below invented a novel category of "slightly ambiguous" insurance policies. The court of appeals expressly acknowledged that there are only two types of policies: ambiguous and unambiguous. See Pet. App. 4a-5a. In determining which category the Eximbank policy fell into, the court said that some of the policy's "language may be slightly ambiguous," but held that other provisions of the policy clarified this ambiguity and that "a common sense reading" of the whole contract indicated that it insures only uncollectible accounts receivable. *Id.* at 13a-14a. This finding that the contract as a whole is "unambiguous" makes the interpretation of the policy a question of law. *Ibid.*

Icicle Seafoods. The court below did not come to its conclusion by independently applying a legal standard to the evidence in the record. Rather, it came to its conclusion after determining that some of the district court's findings about the import of the extrinsic evidence were not supported by the record.[3] *Icicle Seafoods* expressly reaffirms the authority of appellate courts to review the findings of lower courts in this manner. See slip op. 5 ("If [the appellate court is] of the view that the findings of the District Court [are] 'clearly erroneous' within the meaning of Rule 52(a), it [may] have them set aside on that basis.").

b. Petitioners' contention (Pet. 19-21) that, because the insurance policy was issued by a government agency, this Court has a special responsibility to arbitrate the coverage dispute is equally unfounded. Federal agencies enter into a multitude of contracts. Congress has established specialized trial and appellate tribunals (such as the

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[3] Petitioners' assertion (Pet. 15-16) that the "Appeals Court never mentioned any of the factual findings of Judge Eisele, and did not discuss or analyze them," is sophistic. The court of appeals plainly reviewed the entire record in this case. Then, "[h]aving considered the language of the insurance policy and the extrinsic evidence bearing on the parties' intent concerning the nature and extent of coverage, the minuscule premium paid and [petitioners'] rejection of an opportunity to purchase insurance relating to confiscation of equ[i]pment at a much higher price," the court concluded "that the district court erroneously interpreted the policy" (Pet. App. 21a-22a). As noted in text, we think that the court was resolving an issue of law when it made this statement and, therefore, that it had no reason to address the district court's particularized factual findings. But even if the court were thought to be resolving a factual question, it did not have to discuss each of the district court's subsidiary findings. Rather, it had only carefully to review the record and to determine whether the district court's ultimate factual finding—its evaluation of the import of the extrinsic evidence—was clearly erroneous. See *Anderson* v. *Bessemer City*, 470 U.S. 564, 581 (1985) (Powell, J., concurring). The court below clearly did so.

Federal Circuit) to ensure that these contracts are uniformly and consistently interpreted. Congress has never suggested that this Court has a special responsibility to resolve disputes concerning the coverage of Eximbank insurance contracts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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